IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMALGAMATED TRANSIT UNION, LOCAL 1729,	)	
Plaintiff,	)	Civil Action No. 2:15-cv-00806
v.	)	Judge Terrence F. McVerry
FIRST GROUP AMERICA, INC. and FIRST STUDENT, INC.	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO NATIONAL LABOR RELATIONS BOARD's MOTION TO INTERVENE

Plaintiff, ATU 1729 hereby submits this Memorandum of Law in Opposition to the National Labor Relations Board's ("Board") Motion to Intervene. ATU 1729 respectfully requests the Board's motion be denied and dismissed.

I. Introduction

This case involves an action to confirm an arbitration award brought pursuant to section 301 of the Labor Management Relations Act. 29 U.S.C.A. § 185 (1978). (ECF No. 1) The arbitration award was issued pursuant to a collective bargaining agreement executed between Plaintiff, ATU Local 1729 ("ATU 1729") and Defendants First Group America Inc. and First Student Inc. ("First Student").

Now pending before the Court is a motion to intervene filed by the Board- a non-party- pursuant to Fed. R. Civ. P 24 (a)(2) and (b)(2). For the reasons that follow, the Board's Motion to Intervene must be denied

II. Statement of Facts

ATU 1729 incorporates the Statement of Facts as set forth in its Brief in Support of the Motion for Judgment on the Pleadings. (ECF No. 17). Additionally, and as this Court is aware, since the Court's November 24, 2015 memorandum decision granting a stay in this proceeding, the NLRB issued a final order at Case Nos. 06-UC-154144 and 06-RM-154166. The Court's decision to stay this matter was in anticipation of the Board's decision in the aforementioned cases. The Board now seeks intervention in the instant action.

III. Legal Standard

Rule 24 of the Federal Rules of Civil Procedure governs an applicant's motion to intervene in an existing lawsuit. There are two types of intervention under Fed.R.Civ.P. 24; intervention as of right under subsection (a) and permissive intervention under subsection (b). In the instant case, the Board seeks intervention as of right pursuant to Fed. R. Civ. P. 24(a)(2) and permissive intervention under Fed. R. Civ. P. 24 (b)(2).

A. Intervention as of Right

The Board seeks to intervene as of right under Fed. R. Civ. P. 24(a)(2) which provides:

a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2).

The Third Circuit applies a four-part test to determine whether an applicant may intervene as of right. A non-party is permitted to intervene only if: "(1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation" (collectively the "Harris Test"). *Harris v. Pernsley*, 820 F.2d 592, 596 (3d Cir. 1987), cert. denied 484 U.S. 947, 108 S. Ct. 336, 98 L. Ed. 2d 363 (1987) (citation omitted). The applicant bears the burden of demonstrating that it has met all four prongs of the *Harris Test*. See *United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1181 n.9 (3d Cir. 1994).

B. Permissive Intervention

Pursuant to Fed. R. Civ. P. 24(b)(2), a Court may permit an applicant to intervene under the following circumstances:

> (2) *By a Government Officer or Agency.* On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:
>
> > (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

Fed. R. Civ. P. 24(b)(2).

Rule 24(b) affords the Court discretion whether or not to grant permissive intervention. See *Hoots v. Pennsylvania*, 672 F.2d 1133, 1135-36 (3d Cir. 1982). Similar to Rule 24(a), courts

deciding whether to grant an application for permissive intervention consider the timeliness of the application. See *NAACP v. New York*, 413 U.S. 345, 365-66, 93 S. Ct. 2591, 37 L. Ed. 2d 648 (1973); *Kitzmiller v. Dover Area Sch. Dist*., 229 F.R.D. 463, 465 (M.D. Pa. 2005).

C. The Procedural Requirements of Rule 24(c)

Finally, pursuant to Fed. R. Civ. P. 24(c), there are a number of procedural requirements an applicant must meet before being permitted to intervene under either Rule 24(a) or 24(b). First, Rule 24(c) requires the applicant to identify the type of intervention sought-intervention as of right or permissive intervention. See *Gaskin v. Pennsylvania*, 231 F.R.D. 195, 196 (E.D. Pa. 2005). Second, the applicant must file a motion stating the grounds for its proposed intervention. Fed. R. Civ. Pro. 24(c). Finally, the applicant's motion must include a "pleading setting forth the claim or defense for which intervention is sought." *Id.*

IV. Argument

THE BOARD'S MOTION TO INTERVENE SHOULD BE DENIED AND DISMISSED

A. The Board's motion is procedurally defective because it fails to comply with Federal Rule of Civil Procedure Rule 24(c). Therefore, the Board's motion must be denied and dismissed

As set forth above, the standard for evaluating a motion to intervene necessarily requires the Court to first evaluate whether the motion to intervene complies with the procedural requirements of the rule. In other words, before the court may exercise its discretion under subparts (a) and (b) of Rule 24, the Court must determine whether the filing is procedurally proper under paragraph (c) of the rule. Specifically, paragraph (c) requires:

> (a) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion **must state the grounds for intervention and be**

> **accompanied by a pleading** that sets out the claim or defense for which intervention is sought.

(emphasis added)

Pursuant to subparagraph (c) of the Rule, the motion to intervene must "be accompanied by a pleading that sets out the claim or defense for which intervention is sought" Fed. R. Civ. P. 24(c). This requirement is mandatory; indeed, under Rule 24 (c) the motion **must** be accompanied by a pleading. Fed. R. Civ. Pro. 7 defines pleadings as follows:

> Pleadings. (a) There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

In the instant case, there is no dispute the Board failed to include a "pleading" with its motion setting out the claim or defense for which it seeks intervention. Therefore, the Board has not complied with the procedural requirements of Rule 24 (c) governing intervention. The Board's failure to include a pleading with its motion is fatal and requires the motion be denied and dismissed.

The law in this Circuit is well settled on this score. "[S]ince this petitioner did not comply with the rule governing intervention he was not entitled to intervene as of right." *Hirshorn ex rel. Carbon Monoxide Eliminator Corp. v. Mine Safety Appliances Co.,* 186 F.2d 1023 (3d Cir. 1951) Indeed, "[c]ourts in this Circuit have denied motions to intervene when an applicant fails to meet the procedural requirements of Rule 24(c)." *Surety Adm'rs, Inc. v. Samara*, No. 04-5177, 2006 U.S. Dist. LEXIS 40889, 2006 WL 173790, at *3 (E.D. Pa. June 20, 2006) (citing, *inter alia, SEC v. Investors Sec. Leasing Corp.*, 610 F.2d 175, 177-78 (3d Cir. 1979) ("Because the requirements of [R]ule 24(c) were not complied with, the owners were not

proper parties in the district court."); *Lexington Ins. Co. v. Caleco, Inc.*, 2003 U.S. Dist. LEXIS 1318, 2003 WL 21652163 (E.D. Pa. Jan. 25, 2003)("Here, Proposed Intervenors have not attached a "pleading setting forth the claim or defense for which intervention is sought" as required by Rule 24(c). This technical failing alone would warrant denial of the motion.")

Owing to the above precedent, since the Board's motion to intervene indisputably fails to satisfy the procedural requirements of Rule 24 (c), the motion is not proper and therefore must be denied and dismissed.

B. Alternatively, the Board's Motion to Intervene does not satisfy the requirements under Rule 24 (a)(2) or Rule 24 (b)(2)

Apart from the Board's defective filing, which places it in non-compliance with Fed. R. Civ. P. 24 (c), the Board's motion fails to satisfy the necessary elements for either intervention as of right or by permission. Each will be addressed in turn.

(i) The Board's request to intervene as of right under Fed. R. Civ. P. 24(a)(2) should be denied as it does not satisfy the required elements

As noted *supra*, under this prong of the Rule, the Board must establish four elements, which are:

(1) the application for intervention is timely*;*

(2) the applicant has a sufficient interest in the litigation;

(3) the disposition of the litigation poses a "tangible threat" to a legally cognizable interest; and

(4) the interest is not adequately represented by an existing party in the litigation.

Harris v. Pernsley, 820 F.2d 592, 1987 U.S. App. LEXIS 6327, 7 Fed. R. Serv. 3d (Callaghan) 837 (3d Cir. Pa. 1987). If any one element is wanting, the motion must be denied. See *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216, 2005 U.S. App. LEXIS 17151 (3d Cir. Pa. 2005).

a) Timeliness

Initially, the Board's motion is untimely and therefore cannot satisfy this threshold element for intervention under subparagraph (a)(2). Timeliness of an intervention request "is determined by the totality of the circumstances." *United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1181 (3d Cir. 1994). The factors to be considered when evaluating the timeliness of a motion are: (1) the stage of the proceeding; (2) the prejudice that delay may cause the parties; and (3) the reason for the delay. *Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 369 (3d Cir. 1995).

As this Court noted in its November 24, 2015 Memorandum Opinion, ATU 1729 initiated the instant action on June 19, 2015, just four days after First Student initiated the NLRB proceedings. In other words, the Board was fully aware of the instant litigation eight (8) months prior to its current attempt to intervene. There is no explanation or excuse for the Board's delay. Indeed, regardless of the ultimate outcome of the proceedings before the Board, if the agency genuinely believed it had an interest in the outcome of this proceeding, it was duty bound-eight months ago- to seek intervention at the point when it clearly knew of this proceeding.

Further, as this Court is aware, on November 4, 2015 First Student applied for and was granted a Stay to allow the Board's representational proceedings to conclude. (ECF Nos. 20 and 27) When the Stay was requested by First Student, the Board was fully aware of this litigation and, at that point in the litigation, the outcome of the Board proceeding was unknown and

therefore the Board's intervention may then have been appropriate. However, the Board failed to seek intervention at that point, when the representational rights it was adjudicating were less clear. In short, the appropriate time for the Board to intervene, if any, would have been then, not now. Therefore, based upon the totality of circumstances, the Board's attempt to intervene at this point of the proceeding is untimely.

b) Sufficient Interest

To demonstrate an interest sufficient to intervene as of right, "the interest must be 'a legal interest as distinguished from interests of a general and indefinite character.'" *United States v. American Telephone and Telegraph Co.*, 206 U.S. App. D.C. 317, 642 F.2d 1285, 1292 (D.C. Cir. 1980), *quoting Radford Iron Co. v. Appalachian Elec. Power Co.*, 62 F.2d 940, 942 (4th Cir. 1933). To intervene as of right as a party to the litigation, the applicant must do more than show interests that may be affected in an incidental manner. Instead, the applicant must demonstrate there is a real threat to a legally cognizable interest to have the right to intervene. *See, e.g. United States v. Perry County Board of Education*, 567 F.2d 277, 279 (5th Cir. 1978).

The thrust of the Board's motion to intervene on this score is that it must be a party to this litigation in order to protect its authority to decide representation issues under Section 9(c) of the NLRA. For two reasons, this argument fails. Initially, the Board's jurisdiction over the representational proceedings before Region 6 and the full Board have ceased; its role as the agency charged with the authority of deciding representational issues has come to a close and thus such interests are entirely unaffected in the instant proceeding. The Court now has to consider the Board's final decision, as it would any other precedent, in light of the salient law

herein (i.e. supremacy doctrine) and determine whether that decision conflicts with the underlying arbitration award as it relates to this Section 301 enforcement action.

Second, the Board's decision is not subject to attack in this proceeding such that it needs "protecting". The Board's claim it has a "sufficient interest" in protecting its decision when the decision is not under attack herein is meritless. For these reasons, the Board cannot demonstrate it has a sufficient interest intervening in this case.

c*) There is no impairment of any interest, absent the Board's intervention*

The Board claims that absent its intervention, its "…interest in protecting jurisdiction over representational issues will be impaired." (ECF No. 29, at p. 8). This particular claim of the Board has already been addressed and rejected under nearly identical circumstances in *Caterpillar, Inc. v. International Union, United Auto., Aero. & Agric. Implement Workers of Am.*, 1993 U.S. Dist. LEXIS 20374, 145 L.R.R.M. 2173 (M.D. Pa. May 24, 1993). There, the Middle District Court held as follows:

> The NLRB premises its motion for intervention on Rule 24(a), arguing that it has an interest in the current litigation because of its statutory obligation to enforce the NLRA. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245; 79 S. Ct. 773; 3 L. Ed. 2d 775 (1959). The NLRB also argues that "the risk of conflicting Board and Court decisions in this matter, and therefore the potential for impairment of the Board's interest, cannot be overstated." We believe the NLRB's argument is misguided. The Board admits, as it must, that it lacks the capacity or duty to enforce § 302, the provision at issue in the action before the Court. See *BASF Wyandotte Corporation*, 274 NLRB 978 [119 LRRM 1035] (1985), enf'd *NLRB v. BASF Wyandotte Corporation*, 798 F.2d 849 (5th Cir. 1986).

In the instant litigation, the Court is being called upon to decide whether the arbitration award must be enforced under Section 301 of the LMRA. The Board's authority to decide representational issues is rooted in Section 9 (c) of the NLRA. As in *Caterpillar, Inc.*, the Board

has no capacity or duty to enforce Section 301. Stated differently, this Court is not deciding a representational issue under Section 9 (c) of the NLRA - the interest sought to be protected by the Board. Rather, as noted above, the Court must decide whether the arbitration award is enforceable under Section 301, taking into consideration the supremacy doctrine. Simply put, the Board's authority to adjudicate representational issues under the NLRA is not affected by the Court's decision as to whether the award is enforceable under Section 301. Therefore, since its purported interest is not being attacked herein, the Board's presence is unnecessary and otherwise unwarranted.

d) *Inadequacy of Representation*

Finally, in order to intervene as of right, the Board must demonstrate that the existing parties to the litigation inadequately represent the Board's interests. *See Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10, 92 S. Ct. 630, 636 n.10, 30 L.Ed.2d 686, 694 n.10 (1972); *Hoots v. Pennsylvania*, 672 F.2d 1133, 1135 (3d Cir. 1982); *Peninsula Shipbuilders*, 646 F.2d at 122.

Again, the Board's purported interest is its authority to decide representation issues; this interest is not being challenged here. Therefore, since the "interest" it seeks to have protected is not at issue, the need to be adequately represented before the Court is not implicated. In an effort to improvidently shoehorn itself in this litigation, the Board seems to be suggesting to this Court that although its decision is final and its duty discharged under the NLRA, the Court nonetheless needs the Board because the Court is incapable of analyzing an arbitration award and NLRB decision as it relates to this Section 301 action. Put bluntly, the Board's participation in this litigation is irrelevant and therefore unnecessary. Accordingly, this element cannot be satisfied.

Finally, to the extent any such purported interest may be present, that interest is adequately represented by First Student. First Student has ably presented the supremacy doctrine argument to the Court and now it is for the Court to determine whether this doctrine applies to this dispute and if so whether or not the arbitration award and Board decision are in conflict.

(ii) The Board's request to intervene permissively under Fed. R. Civ. P. 24(b)(2) should likewise be denied

In deciding whether to permit intervention under Rule 24(b), "…courts consider whether the proposed intervenors will add anything to the litigation." *See Kitzmiller v. Dover Area Sch. Dist.*, 229 F.R.D. 463, 471 (M.D. Pa. 2005). As noted above, the Board's presence in this suit is irrelevant and therefore the Board's intervention brings no value to this Section 301 proceeding. The Board clings, incorrectly, to the claim its statutory authority will be impaired if the motion to intervene is not granted. Specifically, the Board asserts that it represents the public interest in maintaining its statutory authority and the performance of its public duties. The Board's authority and duty is complete and now it is for the Court to decide whether the Board's representational decision conflicts with the arbitrator's award resolving a contract interpretation issue and in turn whether that award is enforceable under section 301. This role is the sole province of the Court and the Board's intervention is entirely unnecessary to the resolution of this question under Section 301.

Accordingly, the Board's request to permissively intervene under Fed. R. Civ P. 24 (b)(2) must be denied.

V. Conclusion

For the reasons set forth above, ATU Local 1729 respectively requests the Board's motion to intervene as of right or permissively, be denied and dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 2, 2016 I electronically filed the foregoing ***Memo of Law in Opposition the National Labor Relations Board's Motion to Intervene*** via the Court's CM/ECF system, which will send notification of such filing to the following:

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